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No. 721

# In the Supreme Court of the United States

OCTOBER TERM, 1958

COMMERCIAL BARGE LINES, INC., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION*

## MOTION TO AFFIRM

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## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a final judgment entered on October 27, 1958 by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing appellants' action to set aside a declaratory order issued by the Interstate Commerce Commission interpreting Sections 303(b) and 303(f)(2) of the Interstate Commerce Act (49 U.S.C. 903(b) and 903 (f)(2)).

Section 303(b) exempts from Commission regulation the transportation of bulk commodities by a water carrier for a shipper, as long as no more than three such commodities are transported in the same vessel. "Vessel" is defined to include two or more vessels "while navigated as a unit."[1] Thus, under the Act a number of barges combined in a single flotilla are deemed to constitute a single "vessel." Section 303 (f)(2) exempts from regulation "any person" who performs towage for a regulated carrier under a contract or agency arrangement; however, such towage is regulated in connection with the regulation of the carrier for which it is performed.[2]

Appellants are water carriers. The present proceedings originated in 1956 in connection with an application filed with the Commission by appellants' corporate pred-

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[1] Section 303(b) provides in pertinent part:

> Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel * * *.

[2] Section 303(f)(2) provides in pertinent part:

> Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—
>
> * * * * *
>
> (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for [*inter alia*] * * * a water carrier subject to this part, * * * in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

ecessors for authority to merge under Section 5 of the Act.[3] One objective of the merger was the formation of an unregulated subsidiary corporation which, while transporting exempt bulk commodities for third persons, would, at the same time and in the same flotilla of vessels, perform towage for its regulated parent corporations. Under the plan, the subsidiary, although carying nonbulk as well as bulk commodities in the same flotilla, would preserve its 303(b) exempt status as a carrier of bulk commodities. When protestants in the merger case challenged the legality under Sections 303(b) and 303(f)(2) of the unregulated subsidiary's proposed operations, appellants initiated the present proceedings before the Commission for a declaratory order construing those sections.

After full briefing, the Commission (Division 4) held, one Commissioner dissenting, that "the transportation of commodities in bulk in a unit with nonbulk commodities is not transportation exempt from regulation" under Section 303(b) (J. St. 42). The Commission further held (*ibid.*), however, that "incidental towage performed for other carriers subject to the act is exempt from regulation" by virtue of Section 303(f)(2), even though "a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities * * *." The full Commission denied reconsideration, and the district court unanimously held that the Commission's "legal conclusion" as to Section 303(b) was "not erroneous" (*id.*, 31) and dismissed the complaint.

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[3] The merger was authorized in June 1957 and has since been consummated. See *Commercial Transport Corporation—Control and Merger*, 70 M.C.C. 535.

ARGUMENT

Contrary to appellants' assumption (see J. St. 10-15), this case does not involve the proper scope of the towage exemption under Section 303(f)(2). The Commission specifically ruled (*id.*, 42) that the latter exemption is not lost merely because "a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities * * * ." The question presented is whether a water carrier loses its Section 303(b) exemption for the transportation of bulk commodities by including, in the "vessel" in which such commodities are carried, nonbulk commodities which it tows for others. We submit that the court below correctly affirmed the Commission's ruling that the bulk commodities exemption is forfeited if nonbulk commodities are simultaneously transported in the same flotilla.

1. As the opinion below correctly pointed out (J. St. 32), there is "no ambiguity in the plain, easily readable language of 303(b)." That section provides a narrow exemption for the "transportation by a water carrier of commodities in bulk when the cargo space of the vessel * * * is being used for the carrying of not more than three such commodities"; "vessel," in turn, is defined "as including 2 or more vessels being navigated as a unit" (*ibid.*). On its face, therefore, the exemption is available only when the carriage is limited to bulk commodities; it is inapplicable if the carrier mingles nonbulk and bulk commodities in the same flotilla.

The Transportation Act of 1940, of which Section 303(b) is a part, "was intended * * * to provide a completely integrated interstate regulatory system over * * * water carriers" (*United States* v. *Penn-*

*sylvania R. Co.*, 323 U.S. 612, 618-619), and exemptions from such "remedial legislation" "should be narrowed and limited to effect the remedy intended" (*Piedmont & Northern Ry.* v. *Interstate Commerce Comm'n*, 286 U.S. 299, 311; *Spokane & Inland R.R.* v. *United States*, 241 U.S. 344). This rule is especially pertinent here, since, as stated in connection with a predecessor bill, Congress gave "[v]ery painstaking consideration * * * to the working out of these exemptions," including Section 303(b), "to insure that the exemptions would not result in regulated carriers being subjected to unfair competitive disadvantages" (H. Rep. 1217, 76th Cong., 1st Sess., p. 20).

Certificated carriers presently haul, in relatively small individual shipments and under published tariffs, a substantial amount of bulk traffic. Permitting a carrier which hauls exempt bulk commodities, through use of the Section 303(f)(2) towage exemption, to haul additional barges of non-exempt commodities in the same flotilla could result in substantial diversion to unregulated carriers of the bulk traffic which the regulated carriers now handle. It was apparently because of such considerations that Congress specifically rejected an amendment to the bill which would have permitted an otherwise exempt carrier of bulk commodities to carry for a regulated carrier a nonbulk commodity (automobiles) without loss of the Section 303(b) bulk commodity exemption. 84 Cong. Rec. 9980. For such a provision would have enabled a "bulk carrier who is entirely exempt from regulation * * * to destroy the service of the common carrier" subject to regulation in its carriage of automobiles (84 Cong. Rec. 9982).

The Commission consistently has held that "nonbulk commodities cannot be included in a tow of bulk commodities [otherwise exempt under 303(b)] without subjecting the entire cargo to regulation" (J. St. 41).[4] Similarly, the analogous exemption in Section 203(b)(6) for motor vehicles carrying only specified agricultural commodities[5] is lost if commodities not subject to Commission regulation are mingled in the same truck with otherwise exempt agricultural products. *Interstate Commerce Comm'n* v. *Dunn*, 166 F. 2d 116, 117 (C.A. 5); *Interstate Commerce Comm'n* v.

[4] See particularly *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796 (1955); *Ohio River Co. Contract Carrier Application*, 260 I.C.C. 501, 507 (1945); *American Barge Line Co. Applications*, 260 I.C.C. 783, 785-786 (1946); also compare *Arrow Tug & Barge Co. Ext.*, 265 I.C.C. 129, 138 (1947); *American Barge Line Co. Application*, 265 I.C.C. 231, 233, 235 (1947); *Portland Tug & Barge Co. Ext.*, 265 I.C.C. 325, 335 (1948); *Hyer Towing Co. Contract Carrier Application*, 250 I.C.C. 631, 633 (1943); *Inland Navigation Co. Applications*, 250 I.C.C. 703, 707 (1943); *Puget Sound Tug & Barge Co. Applications*, 250 I.C.C. 791, 794 (1943); *Connors Marine Co., Inc., Contract Carrier Application*, 250 I.C.C. 381, 385 (1942); *Jacob Rice & Sons Contract Carrier Application*, 250 I.C.C. 727, 729 (1943); *Mulqueen Contract Carrier Application*, 250 I. C.C. 436, 439 (1942).

Commission decisions also indicate that "liquid bulk," separately exempt under Section 303(d), is counted as one of the three permissible bulk commodities in determining whether the Section 303(b) exemption applies. See, *e.g.*, *Ralph Raike Applications*, 250 I.C.C. 177 (1942); *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I.C.C. 85, 88 (1943).

Appellants' reliance (J. St. 5, 7, 8, 19-20) upon an informal 1944 letter ruling by Division 4 that the Section 303(b) exemption for a barge carrying bulk commodities is not lost if nonbulk commodities (exempt under Section 303(f)(2)) are also included, ignores the fact that, as the Commission pointed out (*id.*, 41), "that ruling was, in effect, reversed" by Division 4 in *American Barge Line Co. Petition for Declaratory Order*, 294 I.C.C. 796.

[5] Section 203(b)(6) exempts "motor vehicles used in carrying * * * agricultural commodities * * * if such motor vehicles are not used in carrying any other property, or passengers, for compensation."

*Service Trucking Co.*, 186 F. 2d 400, 401 (C.A. 3), affirming 91 F. Supp. 533 (E.D. Pa.).

2. Contrary to appellants' contention (J. St. 17), the Commission's construction of Section 303(b) does not "in effect read * * * §303(f)(2) out of the Act." This argument ignores the basic distinction between the two exemption provisions. Section 303(f) (2) exempts from regulation "any person" (whether certificated or not) performing towage for regulated carriers, and subjects such towage to regulation through regulation of the carrier for whom the towage is performed. Thus, unlike Section 303(b), Section 303(f)(2) does not provide an exemption for the carriage of particular commodities, but for particular persons rendering specified services.[6]

As the Commission pointed out (J. St. 42), its reading of Section 303(b) does not impair the tower's continued personal exemption under 303(f)(2), which exists even though "a barge or barges of nonbulk commodities are towed in the same unit with bulk commodities * * *." The sole effect of the Commission's ruling is to require "any person" who elects simultaneously to haul bulk commodities for shippers and to tow nonbulk commodities for carriers in the same flotilla to move his bulk traffic under regulation. The Section 303(f) (2) exemption continues to serve the important pur-

[6] Appellants contend (J. St. 14-15) that the effect of Section 303(f)(2) is to "treat" the "towage service" of a "tower for a certificated carrier" "as not constituting transportation within the meaning of any provision of the Act," and that their towage, therefore, is not "transportation" under Section 303(b). This argument overlooks the fact that Section 303(f)(2) itself recognizes that towage is "transportation" under the Act. For it exempts "transportation by water * * * in the performance of * * * towage" for a regulated carrier, and provides that "such transportation" shall be considered to be performed by the regulated carrier.

poses of enabling regulated carriers to hire independent unregulated exempt tows to supply additional service, and to perform towage for each other under reciprocal arrangements (see Congressman Wadsworth's illustration, 84 Cong. Rec. 9985-9986).[7]

Apart from appellants' unsupported assertions (J. St. 19-21), there is no showing that the Commission's decision is "directly opposed to the objective of efficiency and economy in transportation" (*id.*, 20). Issues as to the economic impact of a particular ruling on a highly regulated industry are preeminently for the Commission to determine, and in fact the Commission had the appellants' present contentions before it (*id.*, 40) when it held that bulk commodities become subject to regulation when mixed with nonbulk commodities in the same "vessel." This Court's language in *American Trucking Assns.* v. *United States*, 344 U.S. 298, 318, rejecting like arguments as to possible "economic danger" resulting from Commission rules regulating transportation of agricultural products, is especially pertinent:

> Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-

[7] Appellants' argument (J. St. 17, emphasis in original) that the 303(f)(2) exemption "can have practical value *only*" if it permits combined operations of the kind here involved assumes that other towing arrangements could in fact be performed under a charter or lease agreement permitted by Section 302(c). But that section applies only to a charter or lease "to a person other than a carrier subject to" Commission regulation, and only if the charterer or lessee is transporting "its own property" (J. St. 11). Standing alone, Section 302(c) would not permit the chartering or leasing of a tow to a regulated carrier, nor would it enable regulated carriers to perform towage operations for each other. These arrangements, therefore, could only be effectuated under Section 302(f)(2).

agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products. We can therefore find nothing in it which implies protection of agricultural truckers' right to haul other property, even though from an economic standpoint that right is important to protect profit margins. Regulated truckers must also receive protection upon their restricted routes and limited carriage. A balance between these competing factors, carried out in accordance with congressional purpose, does not seem to us unreasonable or invalid.

## CONCLUSION

The decision below is correct, and the appeal presents no substantial question requiring plenary consideration by this Court. The judgment of the district court should therefore be affirmed.

Respectfully submitted,

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